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Combined Management, Inc.

IN THE UNITED STATE DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

APPLIED UNDERWRITERS, INC., a  
Nebraska Corporation, and APPLIED RISK  
SERVICES, INC., a Nebraska Corporation,

Plaintiffs,

vs.

COMBINED MANAGEMENT, INC., a Maine  
Corporation, and Does 1 Through 10,  
Inclusive,

Defendants.

Case No. C-07-5129-BZ

DEFENDANT COMBINED  
MANAGEMENT, INC.'S REPLY TO  
PLAINTIFFS' OPPOSITION TO MOTION  
TO DISMISS FOR LACK OF PERSONAL  
JURISDICTION

[Fed. R. Civ. P. 12(b)(2)]

Date: December 5, 2007

Time: 10:00 a.m.

Dept. Courtroom G

Honorable Bernard Zimmerman  
United States Magistrate Judge

1 In response to the argument by Defendant Combined Management, Inc. ("CMI") that its  
 2 contacts with California are insufficient to warrant this Court's exercise of personal jurisdiction  
 3 over CMI, Plaintiffs Applied Underwriters, Inc. and Applied Risk Services, Inc. (together,  
 4 "Applied") make a series of unsupported and unpersuasive points. CMI reminds the Court that  
 5 "[i]t is the plaintiff's burden to establish the court's personal jurisdiction over a defendant." Doe  
 6 v. Unocal Corp., 248 F.3d 915, 922 (9th Cir. 2001).

7 **First**, Applied asserts that Robert Murch of CMI "testified in two separate declarations  
 8 filed in the Federal Court in Nebraska about his *purposeful and repeated contact* with plaintiffs  
 9 in California . . . ." (Plaintiff's Points and Authorities in Opposition to Motion to Dismiss for  
 10 Lack of Personal Jurisdiction ("Opposition") at 1 (emphasis added).) Upon closer inspection,  
 11 however, these "purposeful and repeated contacts" amount to the receipt by CMI of a few pieces  
 12 of correspondence sent into Maine by Applied's San Francisco office; a single piece of  
 13 correspondence sent from CMI to Applied in San Francisco; and CMI's use in Maine (on an  
 14 unspecified number of occasions) of Applied's San Francisco telephone number. These limited  
 15 contacts, moreover, were not the result of a purposeful decision by CMI to do business with a  
 16 California company, but instead were the upshot of the unilateral decision by the insurer,  
 17 Virginia Surety Company, Inc. ("VSCI"), to retain Applied as broker on the CMI account.  
 18 Affidavit of Robert L. Murch, October 5, 2007 ("Murch Aff.") [Ex. A to Defendant Combined  
 19 Management, Inc.'s Memorandum of Points and Authorities in Support of Its Motion to Dismiss  
 20 for Lack of Personal Jurisdiction], at ¶ 6. These limited and reactive contacts with California  
 21 are simply not enough to give this Court jurisdiction over CMI. See Roth v. Garcia Marquez,  
 22 942 F.2d 617, 621 (9th Cir. 1991) ("When a California business seeks out purchasers in other  
 23 states . . . [and] deals with them . . . by interstate mail and telephone, it is not entitled to force  
 24 the customer to come to California to defend an action on the contract.") (emphasis added).

25 **Second**, Applied asserts that the Court has jurisdiction because the parties "have a  
 26 continuing relationship that contemplates contract performance to occur in California . . . ."  
 27 (Opposition at 3.) This assertion is wrong on two counts. First, as explained below, the

1 CMI-Applied relationship was for one year only; there was no "continuing relationship" beyond  
 2 the initial term. (Murch Aff. at ¶ 5.) Moreover, contract performance occurred not in  
 3 California, but in Maine and Nebraska. Although CMI was unaware of the Nebraska nexus at  
 4 the time it entered into the relationship with Applied, and therefore prevailed on a motion to  
 5 dismiss Applied's Nebraska lawsuit for lack of personal jurisdiction, most of Applied's  
 6 performance under the contract was rendered in Nebraska. The insurance policy was issued by  
 7 Applied, acting as broker, in Omaha, Nebraska. Affidavit in Opposition to Defendant's Motion  
 8 to Dismiss For Lack of Personal Jurisdiction ("Brown Aff.") [Ex. A to Defendant's Request for  
 9 Judicial Notice; Ex. B to Defendant Combined Management, Inc.'s Memorandum of Points and  
 10 Authorities in Support of Its Motion to Dismiss for Lack of Personal Jurisdiction], at ¶ 5. CMI  
 11 sent premium payments to Applied in Nebraska; the payments were processed by Applied in  
 12 Nebraska; customer service questions were directed to and responded to in Nebraska; and  
 13 claims by CMI and its clients were submitted to and processed in Nebraska. *Id.* at ¶ 6.  
 14 Contractual performance thus occurred in Nebraska and Maine – where CMI, the insured, does  
 15 business – not in California.

16 It is interesting that both CMI and Applied cite the discussion in the Roth case of the  
 17 significance of *where a contract is performed*. CMI cites Roth because its facts present a stark  
 18 contrast to the facts here. In Roth, purposeful availment was found where "the contract  
 19 concerned a film, *most of the work for which would have been performed in California*,"  
 20 including "all of the editing, production work, and advertising . . . ." 942 F.2d at 622 (emphasis  
 21 added). Here, as just explained, most of the work was performed in Nebraska and Maine,  
 22 notwithstanding Applied's assertion that "much of the performance" – a reference to the limited  
 23 and reactive communications recounted above, which cannot possibly be construed as "most of  
 24 the work" under the contract – "would occur in California." (Opposition at 3.) Roth thus helps  
 25 CMI, not Applied.

26 **Third**, Applied argues that "[t]he burden on defendant to defend in California is  
 27 minimal, as demonstrated by the fact that defendant quickly obtained a San Francisco law firm

1 to represent its interests." (Opposition at 6.) CMI submits that this argument gets Applied  
2 nowhere, since CMI had no choice but to retain California counsel to avoid a default judgment.  
3 The mere fact that CMI took this essential step to avoid a default judgment under the rules of  
4 civil procedure cannot fairly be construed as evidence that CMI would not be burdened by  
5 having to defend in California. CMI is a small Maine company. It would be a substantial  
6 hardship for CMI to have to pay California counsel – on top of its Maine counsel – at rates  
7 approximately twice the market rate in Maine, to litigate this case in California. Likewise, it  
8 would be a severe burden on CMI to have to send its personnel across the country to participate  
9 in a legal proceeding inexplicably filed against it by a Maine-licensed insurance broker, first in  
10 Nebraska, and now in California.

11 **Fourth**, Applied suggests that "[t]he most efficient place to resolve this dispute is in San  
12 Francisco since the negotiation of the contract occurred in San Francisco, the contract was  
13 performed in San Francisco, and documents relevant to the causes of action are in San  
14 Francisco." (Opposition at 6.) This argument is flawed in several respects. CMI negotiated  
15 with Applied from its offices in Maine. (Murch Aff. at ¶ 5.) As explained supra, the contract  
16 was performed in Nebraska and in Maine, not in San Francisco. As for the "documents" located  
17 in San Francisco, it is notable that Applied gives no indication of the volume of documents in  
18 question – presumably because the relevant documents could be transported from San Francisco  
19 to Maine, at minimal cost, in an envelope. See Opposition at 7 (noting "'this era of fax  
20 machines and discount air travel'" (quoting Sher v. Johnson, 911 F.2d 1357, 1365 (9th Cir.  
21 1990)). Nor does CMI identify the witnesses who are located in San Francisco, or acknowledge  
22 that CMI's witnesses are located in Maine.

23 **Fifth**, Applied takes issue with CMI's characterization of the contractual relationship  
24 between the parties as a "one shot deal." (Opposition at 7-8.) But it offers no support for this  
25 argument beyond the assertion that CMI engaged in "repeated contacts" with Applied in  
26 California – which, as just explained, is incorrect. CMI submits that its relationship with  
27  
28

1 Applied was in fact a one-shot deal, lasting just one year, and out of which no ongoing  
2 relationship emerged. (Murch Aff. at ¶ 5.)

3 According to Applied, CMI's "assertions here that it had very little contact with  
4 California are not credible." (Opposition at 1 (emphasis added).) The issue, however, is not  
5 whether CMI's assertions are "credible" – it is whether CMI's contacts with California are  
6 enough for this Court to exercise jurisdiction over CMI. CMI has been forthcoming about its  
7 contacts with California, both in the Nebraska case and in this case. There is nothing  
8 inconsistent about CMI arguing that jurisdiction is proper neither in Nebraska nor in California,  
9 and that Applied should instead litigate its claims against CMI in Maine, where it obtained a  
10 license to serve as an insurance broker and proceeded to sell insurance to CMI. (Murch Aff. at  
11 ¶ 6.)

12 In sum, if Applied wishes to engage in litigation against CMI, it should do so in Maine,  
13 where it is licensed to sell insurance and where CMI does business. Applied sold insurance, on  
14 behalf of VSCI, to CMI in Maine, to cover businesses and workers in Maine. Presumably in  
15 hopes of gaining a strategic advantage over CMI and increasing the burden of litigation on this  
16 small Maine company, Applied has sought to sue CMI everywhere but in Maine. CMI was not  
17 subject to personal jurisdiction in Nebraska, nor is it subject to personal jurisdiction in  
18 California. The proper forum for resolution of this dispute is Maine, where Applied is licensed  
19 to sell insurance, where CMI does business, and where the insured businesses and workers were  
20 located. Because Applied has failed to meet its burden to establish this Court's jurisdiction over  
21 CMI (Doe, 248 F.3d at 922), CMI's motion to dismiss should be granted.

22  
23 Dated: November 5, 2007

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24  
25 By: /s/ Jessica Grannis  
26 Allan Steyer  
27 Jessica Grannis  
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